STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2003
v	No. 239287 Wayne Circuit Court
DEJUAN MURRAY, Defendant-Appellant.	LC No. 00-013133-01

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty to forty years' imprisonment for the murder and assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant alleges that there was insufficient evidence of premeditation and deliberation to support the original charge of first-degree murder and, therefore, the trial court erred in denying his motion for a directed verdict with respect to that charge. Contrary to defendant's argument, we conclude that any error in submitting the first-degree murder charge to the jury was harmless because the charge of second-degree murder was properly submitted to the jury and defendant was acquitted of first-degree murder. *People v Moorer*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, it is not necessary to resolve whether the first-degree murder charge was properly submitted to the jury. *Graves*, *supra* at 479-480, n 2.

Defendant next alleges that the prosecution failed to prove beyond a reasonable doubt that he did not act in self-defense in response to an imminent, armed attack by Gary Newsom. We disagree. "[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). Once a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). This Court must view the evidence in a light most favorable to the prosecution to determine whether a

rational trier of fact could have found that defendant's claim of self-defense was disproved beyond a reasonable doubt. *Id*.

In the present case, defendant testified regarding his belief that Newsom was about to use a deadly weapon. However, Newsom and another eyewitness testified that defendant began shooting first, and Newson did not pull the gun first. Where the resolution of an issue involves the credibility of two diametrically opposed version of events, the test of credibility rests in the trier of fact. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The jury resolved this credibility contest against defendant. This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant next alleges that there was insufficient evidence to support the assault with intent to murder conviction because the evidence failed to show that he intended to kill Newsom. Specifically, defendant contends that he may have acted recklessly, or with conscious disregard of the risk of death, but there was no evidence that he intended to kill anyone. We disagree. "The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The legal premise of defendant's argument, that a reckless intent is inadequate to support a conviction for assault with intent to commit murder, is accurate.

> Specific intent to kill is the only form of malice, which supports the conviction of assault with intent to commit murder. Intent to inflict great bodily harm or wanton and willful disregard of the recklessness of one's conduct is insufficient to support a conviction for assault with intent to commit murder. [*People v Cochran*, 155 Mich App 191, 193-194; 399 NW2d 44 (1986) (citations omitted).]

Contrary to what defendant asserts, however, the evidence that he repeatedly shot at Newson, striking him four times, was sufficient to allow the jury to infer an intent to kill. *People v Plummer*, 229 Mich App 293, 305-306; 581 NW2d 753 (1998).

Defendant next alleges that defense counsel was ineffective for failing to move to suppress evidence of his prior convictions and, as a result, the prosecution was allowed to impeach his credibility by soliciting his admission that he previously lied to law enforcement officers about his name. Defendant asserts that, had counsel objected, the court would have suppressed the evidence under MRE 609(c), because his prior convictions were more than ten years old, and also MRE 609(e), because they occurred when he was a juvenile.

To establish ineffective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant's argument is based on the following testimony:

> *Q*. Now, Mr. Murray, have you ever lied about your name in dealing with law enforcement individuals?

A. Yes, I have.

Q. More than once?

A. Yes.

Q. How many times, approximately?

A. I can't say how many. I was a teenager. I'm 32 years old now. That was in the past. I can't say how many times for sure.

We disagree with defendant's assertion that this colloquy shows that counsel was ineffective for failing to move to suppress prior convictions. No evidence of prior convictions was admitted during this exchange. Defendant's argument assumes that, had counsel moved to suppress evidence of his prior convictions, the above testimony would not have been admitted. However, the challenged testimony did not involve an inquiry about prior *convictions* for lying to the police, which would be governed by MRE 609. Rather, the prosecution asked defendant whether he had been dishonest with the police in the past. This was an inquiry concerning specific instances of conduct that was probative of defendant's untruthfulness, which is governed by MRE 608(b). Unlike MRE 609, MRE 608 does not preclude evidence concerning specific instances of conduct that occurred more than ten years earlier or that were committed when the witness was a juvenile.

Moreover, there is no reasonable probability that the above testimony affected the outcome of the trial. *Toma, supra*. Defendant admitted that he had been convicted of a crime of theft or dishonesty in the past ten years. Defendant does not argue that this evidence was inadmissible. In light of defendant's admission concerning this conviction, there is no danger that the jury's evaluation of his credibility was affected by the evidence that, as a teenager, he lied to the police concerning his name. Therefore, defendant has not shown either deficient performance or the requisite prejudice to establish ineffective assistance of counsel.

Next, contrary to what defendant argues, the trial court did not err by denying his request for lesser offense instructions on the offenses of reckless use of a firearm with resulting injury, MCL 752.861, and injury by discharge of a firearm intentionally aimed but without malice, MCL 750.235. Defendant acknowledges that these are lesser cognate offenses of murder and assault with intent to commit murder. Pursuant to *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002), MCL 768.32 only permits consideration of necessarily included lesser offenses. Cognate lesser offenses, which share several elements and are of the same class or category of the charged greater offense, are not inferior offenses for purposes of MCL 768.32. *Id*. at 354-355. Thus, the trial court did not err by failing to instruct on these offenses.[1]

Defendant also claims that the trial court erred in failing to sua sponte instruct on involuntary manslaughter. Because an involuntary manslaughter instruction was not requested

[1] See also *People v Lowery*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 240001) slip op pp 3-4 with regard to the reckless discharge of a firearm with resulting injury instruction.

below, it may not be considered on appeal absent a showing of plain error affecting defendant's substantial rights. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). In *People v Mendoza*, 468 Mich 527, 541-542; 664 NW2d 685 (2003), our Supreme Court determined that manslaughter, both voluntary and involuntary, is a necessarily included lesser offense of murder. However, a trial court generally does not have a duty to give lesser offense instructions that are not requested. See *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997), citing *People v Beach*, 429 Mich 450, 482-483; 418 NW2d 861 (1988). Therefore, the court's failure to instruct on involuntary manslaughter, absent a request by defendant, was not plain error.

Defendant claims that trial counsel was ineffective for failing to request an instruction on involuntary manslaughter. However, the decision not to request an instruction on lesser included offenses is considered a matter of trial strategy. See *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1995); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Moreover, an instruction on involuntary manslaughter was not supported by a rational view of the evidence. Defendant did not testify that he shot the gun accidentally. Rather, he claimed that he shot the gun intentionally for the purpose of defending himself from Newson. "[I]nvoluntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and willful disregard of its natural consequences." *Mendoza, supra* at 541, quoting *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). Because the evidence did not support an instruction for that offense, a request for the instruction would have been futile. Thus, counsel was not ineffective for failing to request the instruction. See *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

Defendant also claims that the trial court improperly instructed the jury that intent to kill may be inferred from the use of a dangerous weapon. According to defendant, unlike other standard instructions concerning inferences, the instruction here did not inform the jury that the inference was not mandatory or that other inferences could be drawn. Without an explanation of an inference and an indication that an inference is not required and is not conclusive, defendant asserts that the jurors may have believed that they were required to infer that he had an intent to kill. Because defendant did not object to the court's instructions below, our review of this issue is limited to plain error affecting defendant's substantial rights. *Grant, supra* at 552-553. Here, the challenged instruction was consistent with CJI2d 16.21. The instruction correctly reflects that a factfinder may infer malice from the use of a dangerous weapon. See *People v Garcia*, 36 Mich App 141, 142; 193 NW2d 187 (1971). The instruction did not indicate that the jury must make the inference unless other evidence showed a contrary intent. Although other standard criminal jury instructions concerning inferences expressly inform the jury that it is not required to make the inference,[2] the omission of a similar statement here did not constitute plain error.

Finally, defendant argues, in propria persona, that this Court should remand for a *Ginther*[3] hearing to allow him to develop a factual record to support his claim that counsel was ineffective for failing to investigate and present his theory that Newson, not defendant, killed

[2] See, e.g., CJI2d 23.2, 24.10, 27.2, 27.4, and 29.6.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Cannon. Defendant has failed to support his request with an affidavit or offer of proof concerning the evidence that would be presented at the evidentiary hearing. MCR 7.211(C)(1)(a)(ii).[4] He has only attached pages of trial transcript. To the extent defendant is claiming that ineffective assistance of counsel is established by the existing record, we disagree. Contrary to defendant's argument, trial counsel presented evidence to support defendant's claim that Newson shot Cannon and argued for acquittal on that basis during her closing argument.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[4] MCR 7.211(C)(1)(a)(ii) specifically requires that a motion to remand "must be supported by affidavit or other proof regarding the facts to be established at a hearing." A *request* to remand, presented as proposed relief in a party's appellate brief, must also meet this preliminary threshold before this Court will grant relief.